



DECISION

Fair Work Act 2009

s.739 - Application to deal with a dispute

Tasmanian Water and Sewerage Corporation

v

Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (C2023/7631)

DEPUTY PRESIDENT GOSTENCNIK

MELBOURNE, 28 MARCH 2024

Alleged dispute about any matters arising under the enterprise agreement and the NES

[1] Tasmanian Water and Sewerage Corporation (TasWater) is covered by several enterprise agreements, relevantly, the *TasWater General Employees (Northern Region) Enterprise Agreement 2021*, the *TasWater General Employees (North Western Region) Enterprise Agreement 2021* and the *TasWater General Employees (Southern Region) Enterprise Agreement 2021* (together “the Agreements”). The Agreements variously cover several registered organisations, including the Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia (CEPU) in respect of each Agreement, the Construction, Forestry, Mining and Energy Union (CFMEU) in respect of the first two mentioned Agreements, and The Australian Workers’ Union (AWU) in respect of the third mentioned Agreement.

[2] Some of TasWater’s employees may, while performing duties, become exposed to airborne contaminants including crystalline silica, asbestos and other chemicals used or encountered at its workplace. The risk to exposure cannot be eliminated. TasWater has in place risk control measures to manage and reduce the risk. These include the supply and use of appropriate respiratory protective equipment (RPE), which is a type of personal protective equipment (PPE). TasWater maintains a PPE procedure, which sets out its requirements for the selection, approval, use, inspection, maintenance and disposal of PPE. The procedure is readily accessible to employees on TasWater’s intranet and forms part of the training for all new employees and training regularly thereafter. TasWater says that the procedure has always contained a requirement that an employee be clean shaven when using RPE but accepts that this requirement was not strictly enforced. For the reason discussed further below, the first proposition is not strictly correct.

[3] In mid-2022 TasWater commenced reviewing routine tasks undertaken by TasWater employees that required RPE as a risk control measure for particular hazards and assessed the suitability of various forms of RPE. This included a review of TasWater’s PPE procedure. On 11 September 2023, TasWater sent an all-staff email releasing the final version of a revised PPE procedure, which included the requirement for employees to wear appropriate RPE when

performing tasks that may expose workers to hazardous airborne contaminants. This included a requirement for employees to be clean shaven between the face and the face seal when wearing RPE. On 1 December 2023, an email was sent to some employees advising that the review of RPE suitability had been conducted and that full compliance with the RPE procedure would be required from 11 December 2023. On 4 December 2023, TasWater sent an all-staff email confirming that employees need to comply with the PPE procedure and that the requirement to safely wear RPE would be enforced from Monday 11 December 2023.

[4] On 30 November 2023 the CEPU raised a dispute under each Agreement, which concerned many aspects of the implementation of the RPE usage aspects of TasWater's PPE procedure. The Agreements each contain a status quo provision where the position that existed prior to the dispute arising will prevail until a dispute is resolved, except where a reasonable concern related to the health and safety of any person exists or the parties agree otherwise. The position that existed prior to the dispute arising was that TasWater did not enforce the PPE procedure (implicit) requirement that an employee be clean shaven between the face and the face seal of RPE.

[5] By its application dated 7 December 2023, TasWater applied under s 739 of the *Fair Work Act 2009* (Cth) (Act) for the Commission to deal with a dispute in accordance with the dispute settlement procedure of the Agreements.

[6] Attempts by the Commission to resolve the dispute by means other than arbitration have been unsuccessful. The parties have agreed that the dispute should be resolved by the Commission answering two questions as follows:

- first, is the direction that TasWater employees comply with the TasWater's PPE procedure a lawful and reasonable direction?
- second, does the 'status quo' provision of the [Enterprise] Agreements apply?

[7] The AWU sought and was granted permission to intervene in the dispute, but apart from attending the hearing and supporting the position of the CEPU, it did not file any materials nor actively participate in the hearing.

[8] The proper approach to determining whether the direction, the subject of the dispute, is a lawful and reasonable direction is not controversial. An employee is at common law under a duty to obey lawful directions - those falling within the scope of the employment contract, and which are reasonable.¹ Determining whether a direction is reasonable is a question of fact having regard to all the circumstances.² A direction need not be the preferable or most appropriate course of action in accordance with 'best practice' or in the best interests of the relevant parties to be reasonable.³

[9] TasWater provides drinking water and sewerage services across Tasmania by operating and maintaining water treatment plants, sewage treatment plants, the network of pipes, and related infrastructure and it employs approximately 988 employees.⁴

[10] It is uncontroversial that TasWater and its employees have duties under the *Work Health and Safety Act 2012* (Tas) (WHS Act). TasWater's operations are also subject to a range of regulatory requirements.⁵ Its operations are complex. They cover the whole of Tasmania and

involve operating, maintaining, repairing and building Tasmania's water and sewerage infrastructure and responding to customer requests for assistance.⁶ The services TasWater provides include: sourcing, treating and delivering water to customers; collecting, transporting and treating sewage; and safely returning effluent to the environment.⁷

[11] TasWater maintains a "Service Delivery" function, which is responsible for ensuring that water and sewerage services are provided to TasWater customers in a reliable and efficient manner.⁸ That function includes operating TasWater's water and sewage treatment plants and maintaining its network of pipes and related infrastructure.⁹ It maintains service standards, which include responding to a burst water main within an hour, fixing a burst water main within five hours and responding to a sewer spill within an hour.¹⁰

[12] There are approximately 400 employees engaged in Service Delivery,¹¹ and many are employed as Senior Operators or Water Service Operators (together, "Operators").¹² These operators repair faults reported to TasWater.¹³ This requires Operators to cut through cement, bricks, asphalt and other substances to access pipes, remove the damaged part of the pipe by cutting it and replacing the damaged part.¹⁴ As each of these processes requires cutting, there is resulting airborne hazardous material,¹⁵ which includes asbestos and crystalline silica - both can cause severe illness or death if inhaled.¹⁶

[13] Some Service Delivery employees are responsible for assigned infrastructure, including bulk water and wastewater treatment plants and their functions are peculiar to that infrastructure, such as the maintenance of wastewater treatment plants within a region.¹⁷ In some treatment plants, Operators change out drums of liquid chlorine, two to four times in a month.¹⁸ Operators in a treatment plant may also be required to enter areas where hydrated lime is used in treatment of wastewater.¹⁹ Some Operators are also required to enter areas of pump stations where there may be a risk of exposure to airborne pathogens, hydrogen sulphide and concentrated carbon dioxide.²⁰

[14] When a risk to a person's health and safety that is associated with airborne contaminants cannot be eliminated, minimising the risk requires various control measures to be implemented. Apart from using RPE and other PPE, TasWater uses a range of higher-level design, engineering, administrative and environmental controls to manage these risks, such as training and dust suppression by watering down surfaces, ventilation, and isolation controls, which means restricting access to certain areas. RPE is a lower-level control measure used but it is still necessary and important. Operators use both disposable dust masks and half-face respirators, such as Non-Powered Air Purifying Respirators (NPAPR) – a type of RPE using the wearer's breathing to pull ambient air through a filter attached to a face mask, and Self-Contained Breathing Apparatus (SCBA) - a type of RPE worn by a person providing autonomous supply of breathable air into a face mask - to control these hazards while performing work. TasWater provides various types of RPE to its employees, which they need to use in carrying out work.²¹

[15] The PPE procedure, which as earlier noted was reviewed and amended during 2022-23, had been in place at TasWater since at least 2016.²² Before its review and amendment, the PPE procedure relevantly provided:

"5.3.6. Respiratory Protection

The selection of respiratory protection devices must be done with extreme care. Refer to the relevant SDS(s) for guidance on the selection of respiratory protection when handling chemicals.

...

Respirator Selection

When selecting respiratory protection, consider:

- ...
- ...
- ...
- The operator required to wear the protection. Do they have facial hair?

Facial hair

Any facial hair (e.g. beard, moustache, side burns) between the skin and the sealing surface of the respirator may prevent an adequate seal. Workers with any facial hair are not permitted to enter potentially contaminated air spaces until they can confirm and maintain a positive seal. Respirators must only to be used by competent personnel. The Australian Standard AS1715 states;

Australian Standard AS1715

8.3 Facial Hair in RPE Fitting

Facial hair lying between the sealing surface of a RPE facepiece and the wearer's skin will prevent a good seal. Beards, moustaches and sideburns prevent satisfactory sealing. Long hair may also interfere with the operation of exhalation valves. The sealing problem is especially critical when close fitting facepieces are used. The reduction in pressure developed in the breathing zone of these respirators during inhalation may lead to leakage of contaminant into the facepiece where there is a poor seal. Therefore, individuals who have stubble (even a few days' growth will cause excessive leakage of contaminant), a moustache, sideburns, or a beard which passes between the skin and the sealing surface should not wear a respirator which requires a facial seal. Comprehensive guidance on the selection of respiratory protection is available in AS/NZS 1715."²³

[16] As earlier noted, TasWater says that the PPE procedure has, since its inception, contained a requirement that an employee be clean shaven when using RPE but that this requirement was not strictly enforced.²⁴ However, the procedure does not expressly require an employee be clean shaven when using RPE, although this may have been implicit. The only requirement imposed is that “[w]orkers with any facial hair are not permitted to enter potentially contaminated air spaces until they can confirm and maintain a positive seal” [emphasis added], noting that the procedure provided that “[a]ny facial hair (e.g. beard, moustache, side burns) between the skin and the sealing surface of the respirator may prevent an adequate seal” [emphasis added]. This is not as strident as the Australian Standard AS1715, which noted that “[f]acial hair lying between the sealing surface of a RPE facepiece and the wearer’s skin will prevent a good seal” and the “[b]eards, moustaches and sideburns prevent satisfactory sealing” [emphasis added].

[17] Kathryn Taylor is Head of Health and Safety at TasWater. Ms Taylor gave evidence about the review of the PPE procedure and the consultation relating to the revised procedure. Ms Taylor commenced in her role in August 2021.²⁵ Ms Taylor said that after commencing in the role she devoted an initial period of about three to six months taking stock of the health and safety function at TasWater and embarking on a review of TasWater's health and safety procedures and processes.²⁶ Ms Taylor said that this triggered further detailed work within the health and safety team, including a review of all health and safety system documentation and operational practices.²⁷ Ms Taylor said that as a result of this work, she identified that a key health and safety area for improvement for TasWater was the use of RPE, including employee compliance with RPE requirements in the PPE procedure and TasWater's fit testing processes.²⁸ As to the former, Ms Taylor had identified that some Operators were working with chlorine and other airborne contaminants using RPE while not clean shaven. As to the latter, TasWater engaged new third party providers to undertake fit-testing training for employees, which commenced on 29 January 2024.²⁹

[18] Ms Taylor said that once she identified that some Operators were working with chlorine using RPE while not clean shaven, she recommended to the executive team that steps be taken to address the risk – that all employees using SCBA at TasWater be clean shaven. Ms Taylor said that, as part of her assessment of the risk, she learned that there was no alternative RPE available for use as a risk control measure when using RPE in connection with chlorine exposure and that SCBA was required to be worn. She learned that SCBA is only effective as a control measure if an operator wearing it is clean shaven between the face and the face seal. Ms Taylor said that the recommendation was accepted and TasWater implemented the requirement that employees be clean shaven between the face and the face seal when using SCBA. TasWater has enforced compliance with this requirement.³⁰

[19] Ms Taylor said that, after dealing with the hazards associated with chlorine, TasWater reviewed the suitability of RPE as a risk control measure. To this end, TasWater conducted a risk assessment, which included input from external occupational hygienists. Ms Taylor said that health and safety representatives (HSRs) were consulted about the initial desktop review, occupational hygiene monitoring, and final risk assessment.³¹ Ms Taylor said that in formulating the risk assessment, TasWater considered a range of matters, including environmental work conditions, the minimum RPE required to provide appropriate protection and alternative RPE to that which is used, specifically Powered Air Purifying Respirators (PAPR).³² Ms Taylor said TasWater also considered various information, such as PPE manufacturer guidance, a report from an occupational hygienist, observations of the health and safety team, feedback from Operators and other employees and input by HSRs.³³

[20] Ms Taylor's evidence was that the risk assessment undertaken identified that:

- of the 13 common tasks undertaken by employees where RPE is required, only 2 were considered low-risk for use of PAPR;
- because of task sequencing, unplanned activities, and challenges with decontamination and maintenance of units, a like-for-like use of PAPRs to replace other existing RPE was not possible;

- although PAPR units have a higher protection factor than, for example, a P2 dust mask, there are many things that can impact the effectiveness of a respirator and the actual protection factor achieved when using it in a work environment;
- existing RPE, used in accordance with manufacturer's instructions, the requirements in the PPE procedure and any additional task specific risk control measures identified in a task specific risk assessment or procedure, in combination with other control measures, were sufficient to protect workers at TasWater;
- any PAPR units used at TasWater would need to be maintained by TasWater, in a manner similar to other PPE and RPE; and
- there was a significant cost to introducing PAPR units. TasWater could make some available, but employees using PAPR units for particular tasks will still have to be clean shaven to wear other RPE required for other tasks.³⁴

[21] Ms Taylor set out that which appears to be an extensive and elongated consultation engagement commencing in June 2022 and concluding on or around 28 July 2023. This included consultations with the Workplace Consultative Committee (WCC), union delegates and officials, HSRs, various levels of management and affected employees and considering feedback.³⁵ Ms Taylor's evidence was that TasWater considered the risk assessment and matters raised during consultation in formulating the revised PPE procedure. A copy of the revised procedure was circulated to all employees on 11 September 2023.³⁶ Relevantly, the revised procedure provided:

“6.4 Respiratory protection

- Respiratory PPE must be used in accordance with AS/NZS1715: Selection, Use and Maintenance of Respiratory Protective Equipment.
- Respiratory PPE is required when an employee or contractor may be exposed to hazardous airborne contaminants, such as dust, fumes, or chemicals. Visitors must not be exposed to environments in which respiratory protection is required.
- The selection of respiratory protection devices must be undertaken with due care and appropriate to the hazard and task.
- Refer to the relevant SDS for guidance on the selection of respiratory protection when handling chemicals.
- Risk tools such as Standard Operating Procedures, Work Instructions, Permits or JSEAs must specify the type of respiratory protection required to control the risk.
- Only employees and contractors with approved training are permitted to perform tasks that require the use of SCBA.
- All SCBA units must be inspected and tested every 6 months.
- See the below table for minimum standards with regards to respiratory protection.

[Table is not reproduced]

- When selecting, using, and storing respiratory PPE, it is important to take the following into consideration:
 - Those who use respiratory PPE that requires a facial seal must be cleanshaven between the face and the seal. See further detail below.
 - RPE must be kept clear of dust, corrosive atmospheres, oil, and direct sunlight when stored.

6.5 Respiratory Protection & Facial Hair

- Any facial hair (e.g., beard growth, moustache, sideburns) between the skin and the sealing surface of the respirator may prevent an adequate seal.

- Individuals who have stubble (even a few days' growth), a moustache, sideburns, or a beard which passes between the skin and the sealing surface cannot perform activities which require respiratory PPE.
- Employees and Contractors must be clean shaven between the face and the respiratory protection seal if using respiratory PPE.
- Manufacturer's instructions and regulatory guidelines must be followed in relation to facial hair and proper fit/seal."³⁷

[22] The revised procedure makes explicit that which might hitherto have been thought as implicit – that employees must be clean shaven between the face and the respiratory protection seal when using respiratory PPE. With the consequence that employees who have stubble, a moustache, sideburns or a beard which passes between the skin and the sealing surface are prohibited from performing activities which require respiratory PPE.

[23] Ms Taylor gave evidence about the steps taken to implement the revised procedure. She said that between 12 September 2023 and 30 December 2023, TasWater held toolbox talks with operational employees to facilitate discussion about the revised PPE procedure, outline the new requirements, and ensure employee compliance with procedure. During these talks, responses to concerns and questions about the revised procedure were given. Further information about silicosis and wearing correct PPE, including RPE, in line with the manufacturer's instructions was distributed to employees on 8 November 2023. On 1 December 2023, an email was sent to service delivery employees giving notice that the review was completed, and that full compliance with the revised PPE procedure would be enforced from 11 December 2023. On 8 December 2023, an email was sent to all employees advising that a dispute had been lodged by several unions about the requirement to comply with the revised procedure but that the requirement to comply would still apply from 11 December 2023. On 11 December 2023, an email to all TasWater employees was sent, which included a link to a RPE Awareness Pack and Video. These were also made available to employees on TasWater's intranet. Team Leaders, assisted by members of the health and safety team, had conversations with the employees in their teams about the revised PPE procedure and the information in the RPE Awareness Pack and Video. A copy of the RPE Awareness Pack was also distributed to the CEPU, AWU and CFMEU on 11 December 2023. On 12 December 2023, a meeting was held with the WCC (which included representatives from TasWater's management, human resources and health and safety teams, union delegates and representatives) at which the RPE Awareness Video was viewed and discussed. On 21 December 2023, TasWater sent an email to all of its employees about TasWater's requirement to comply with the revised PPE procedure and included a link to the RPE Awareness Pack and Video.³⁸

[24] Brendan Windmeyer is TasWater's General Manager – Service Delivery. He gave evidence that around four employees have indicated that they do not intend to comply with the requirements of the PPE procedure.³⁹

[25] The CEPU filed two witness statements the makers of which were not required for cross-examination. The first was from Peter Burnaby⁴⁰, an employee of TasWater since November 2011 in the role of Water and Sewer Operator and a delegate of the CEPU who sits on the WCC.⁴¹ The second was from Matthew Holz⁴², also a TasWater employee, employed since 14 October 2015 as a Water Services Operator. He is a CEPU delegate and in that capacity, he attended various meetings of the WCC and participated in discussions about the revised PPE

procedure.⁴³ He is also a HSR and, in that capacity, he regularly attended HSR committee meetings.⁴⁴ As a general observation, both statements were replete with hearsay and impermissible opinion evidence, rendering the weight that is to be attached to such evidence minimal. Whilst there is some criticism in these statements of the consultation process as being a one-way conversation, the substance of Ms Taylor's evidence about the lengths to which TasWater went to consult is not seriously challenged. No evidence was called that consultation did not occur or that it was perfunctory. I accept Ms Taylor's evidence. Other criticism made of the consultation is impressionistic, rather than substantive, or amounts to a complaint that suggestions made were not taken up without setting out the specific suggestions or engaging in any examination of their merits. Much less is it acknowledge that consultation is just that – it is not a veto and does not confer a right that suggestions made will be taken up. But consultation will require that suggestions made will be properly and genuinely considered and if not adopted there is a rational reason for not doing so. There is no suggestion in the evidence that suggestions made were not genuinely considered, nor that decisions not to take up particular suggestions were not rationally based. Moreover, it is to be borne in mind that the consultation concerned in essence implementation of a requirement, implicit in the PPE procedure since 2016, but one sporadically enforced, that employees be clean shaven when using RPE.

[26] The CEPU ultimately accepted that Mr Burnaby was consulted – he was after all a member of the WCC – and so it must also accept that Mr Holtz was consulted as he was involved as a delegate and HSR.⁴⁵ But the CEPU says more generally that many employees were not consulted.⁴⁶ Unfortunately, the CEPU led no direct evidence from any affected employee to make good that point. Indeed, the contention runs counter to the evidence of Ms Taylor, which I accept, which detailed the extensive consultation not only with delegates and HSRs, but with affected employees.⁴⁷ By way of just one example, on 15 August 2022, TasWater sent an email (via its noticeboard) to all employees informing them of the status of the consultation process in relation to the requirement for employees to be clean shaven when using RPE. Employees were advised that:

Consultation on breathing apparatus and being clean shaven is still progressing. Presentations have been conducted by leaders round the state and a number of people have used the feedback form available on the Information and FAQ Page. All employees across the business impacted by the proposal are encouraged to use the form – it is quick and easy, and can be done anonymously. Feedback should be received by Wednesday, 31 August 2022. Exploration of safe and suitable alternatives for other respiratory protective equipment (RPE) is continuing during the consultation period.⁴⁸

[27] The evidence is that TasWater conducted extensive consultation with its employees, HSRs and relevant unions including through 26 consultation meetings with individual teams, 13 written communications, four meetings with the unions, three WCC meetings; several meetings with various HSRs and a number of toolbox meetings with employees. Throughout the lengthy consultation period, employees, HSRs and the unions had many opportunities to provide feedback to TasWater.⁴⁹ Absent any direct evidence that one or more affected employees were not consulted by TasWater, the CEPU's contention must be rejected.

[28] The CEPU suggested that a direction that is inconsistent with TasWater's obligations under the WHS Act to eliminate or minimise the relevant risks so far as practicable, or that would require the operators to work in a manner inconsistent with their obligations under the

WHS Act, is an unlawful and unreasonable direction. That may be true, but that is not here the case.

[29] Section 17 of the WHS Act provides that a duty holder required to ensure health and safety, here TasWater, eliminate risks to health and safety, so far as is reasonably practicable and if it is not reasonably practicable to eliminate risks to health and safety, to minimise those risks so far as is reasonably practicable. The supply and use of RPE is one of the measures that TasWater takes, which is directed to minimising the earlier identified risks so far as is reasonably practicable. The CEPU's complaint about the use of alternative RPE is, in substance, a complaint that the RPE supplied for use, together with the other mitigation measures will not minimise the risks so far as is reasonably practical. In substance, it says further reasonably practicable steps can be taken by supplying alternative RPE for use by the bearded dissenters. That may be correct, but the CEPU led no probative evidence to support such a contention. Moreover, that further steps could or even should be taken does not mean that the steps taken are inconsistent with the duty holder's duty under the WHS Act or that a direction to be clean shaven when using particular RPE - one of the mitigation steps - was unreasonable. In my view, the PPE procedure, the supply of the RPE at issue and the direction to be clean shaven when using the RPE are all steps directed to meeting TasWater's obligation under s 17 of the WHS Act as well as regulation 44 of the *Work Health and Safety Regulations 2022* (Tas) (WHSR), which is discussed further below.

[30] Moreover, the PPE procedure, including its clean shaven requirement, is necessary to ensure that the RPE that TasWater supplies works safely in accordance with AS/NZS 16975.3:2023 and the manufacturer's specifications.⁵⁰ To this end, TasWater employees have a duty under s 28 of the WHS Act to, *inter alia*:

- comply, so far as the worker is reasonably able, with any reasonable instruction that is given by the person conducting the business or undertaking to allow the person to comply with this Act; and
- cooperate with any reasonable policy or procedure of the person conducting the business or undertaking relating to health or safety at the workplace that has been notified to workers.

[31] There is no dispute that the direction can otherwise lawfully be given by TasWater as one that is within the scope of the employment and the contract governing the employment relationship. The direction to comply with the revised PPE procedure and its clean-shaven requirement is an appropriate control measure directed to genuine health and safety risks in the workplace earlier identified.

[32] For these reasons, I am satisfied that the direction that TasWater's employees comply with the PPE procedure is a lawful direction.

[33] The CEPU contends that TasWater's insistence that employees be clean shaven while at work when using RPE was an unreasonable direction when regard is had to the following matters.

[34] *First*, the CEPU says that fit testing conducted on 30 January 2024 has shown the RPE supplied by TasWater provides no seal and therefore no protection for some employees. Mr

Burnaby said that on 30 January 2024, he attended TasWater's Moonah depot for a fit test on a disposable P2 mask of the kind commonly supplied by TasWater and that he was unable to achieve a seal and was not issued a certificate to use the mask.⁵¹

[35] Regulation 44(3) of the WHSR provides that a person conducting a business or undertaking, who is required to provide the personal protective equipment to workers at the workplace, must ensure that personal protective equipment provided is:

- "(a) selected to minimise risk to health and safety, including by ensuring that the equipment is –
 - (i) suitable having regard to the nature of the work and any hazard associated with the work; and
 - (ii) a suitable size and fit and reasonably comfortable for the worker who is to use or wear it; and
- (b) maintained, repaired or replaced so that it continues to minimise risk to the worker who uses it, including by ensuring that the equipment is –
 - (i) clean and hygienic; and
 - (ii) in good working order; and
- (c) used or worn by the worker, so far as is reasonably practicable."

[36] Regulation 44(3)(a) of the WHSR deals with that which is described as fit testing. Apart from regulation 44(3) of the WHSR, it is uncontroversial that fit testing is required under AS/NZS 16975.3:2023.⁵²

[37] Ms Taylor gave evidence that the process for fit testing is informed by that standard, as well as a variety of historical and supplementary standards, such as OSHA 1910.134 (historical) and AS/NZS 16975.3:2023 (current), which provide additional guidance on conducting fit testing to meet the requirements of the standard.⁵³ The purpose of fit testing is to ensure that a wearer of RPE understands what a good and poor seal feels like and how their individual circumstances, including their type of work, facial structure, level of exertion or movement, may impact the fit and, therefore, the effectiveness of RPE.⁵⁴

[38] Ms Taylor said that fit testing also measures something called the "fit factor". While this is only relevant in fit testing itself, it has a relationship with the "protection factor", which is a designated factor assigned to each type of RPE by the manufacturer. Ms Taylor said that the protection factor is important as it is the number used in occupational hygiene calculations, along with other data such as breathing rate and contaminant concentration rates in air, to calculate an actual or potential exposure to a person. Ms Taylor said that while fit testing itself aims to achieve the relevant fit factor, in this case 100, TasWater only uses the protection factor in any assumptions made about the effectiveness of RPE.⁵⁵

[39] Ms Taylor said that in January 2024, TasWater commenced fit testing in Hobart. On the first day of fit testing, some employees only had one type of mask from which to choose but those attending on the second day had more options. All who tested passed about half the testing components, achieving the recommended "fit factor" of 100 when breathing normally, deeply and moving their heads. Several employees had difficulty with the more challenging

components of the test but several still passed these when trying a different type of RPE. Ms Taylor said that any employee who did not pass on the first occasion is anticipated to pass overall once they try an alternative type of mask and are retested. She said that only two employees failed due to them having visible stubble. Ms Taylor said that the fit testing included an additional test called the "grimace test", which was required under an old standard (OSHA 1910.134) but is not required under the current guidance (AS/NZS 16975.3:2023). TasWater does not require its employees to pass the "grimace test", does not anticipate any challenges with ensuring everyone passes fit testing once all the relevant RPE is available and will continue fit testing until everyone has passed.⁵⁶

[40] As to Mr Burnaby's evidence, Ms Taylor said that although Mr Burnaby failed the testing on one kind of respiratory protective equipment, he passed when fit tested for two other kinds of respiratory protective equipment.⁵⁷ I accept Ms Taylor's evidence. Mr Burnaby's evidence appears to have been incomplete.

[41] It appears to me on the evidence that TasWater has undertaken fit testing in accordance with regulation 44(3) of the WHSR and AS/NZS 16975.3:2023 and that it will ensure all employees required to use RPE pass the testing. This is consistent with the recommendation made by the Occupational Hygienist it engaged in the second half of 2021 to study asbestos exposure levels during cutting of asbestos cement pipe at the TasWater Rocherlea Depot.⁵⁸ The report subsequently provided to TasWater recommended that TasWater should: "[e]nsure adequate respiratory protection is used during cutting of AC pipe. Respiratory protection should be selected used and maintained in accordance with Australian Standard AS/NZS 1715:20097 [now AS/NZS 16975.3:2023] including training of workers and respirator fit testing".⁵⁹

[42] In the result, this circumstance is not a matter that weighs against a conclusion that the direction at issue is unreasonable. To the contrary, it weighs forcefully the other way.

[43] *Second*, the CEPU says that alternative models of RPE are available with sealing surfaces below the level of most beards. This I take to be a reference to PAPR units. The evidence of Ms Taylor was that TasWater conducted a risk assessment into the use of RPE in the workplace and as part of that assessment, it considered whether PAPR units could be provided to employees. Ms Taylor's evidence was that TasWater determined this was not reasonably practicable, because of the nature and sequencing of the work employees perform; that the work is performed outside, including in wet weather; the difficulties in maintaining PAPR units; PAPR units' propensity to break or become damaged (and the resulting lack of available replacements at a worksite); the risk of a PAPR unit becoming contaminated; and the significant cost of PAPR units.⁶⁰ The CEPU led no probative evidence to contradict Ms Taylor and I accept her evidence. The RPE chosen by TasWater does not appear to suffer from these limitations and is fit for purpose. Consequently, this circumstance does not weigh in favour of a conclusion that the direction at issue is not reasonable.

[44] *Third*, the CEPU says, based on Mr Windmeyer's evidence,⁶¹ that only four employees are known to have indicated an intention not to comply with the shaving requirement. I take this to be a plea for an exception. The dispute is about some employees refusing to comply with TasWater's direction. That some employees have refused to comply does not make the direction unreasonable. That the dissenters might be few does not alter that assessment. That

TasWater does not agree to except a handful of employees from the direction does not, without more, render the direction unreasonable. Moreover, as Mr Windmeyer explained, if a small number of employees are permitted to “opt-out” of the PPE procedure, he anticipated additional employees would also seek to opt out, and it would be unfair to complying employees and likely cause scheduling issues and delays in the performance of some works.⁶² I tend to agree.

[45] However, the PPE procedure does deal with exemptions in appropriate circumstances. Clause 5.7 of the procedure provides:

“5.7 Exemptions

- Any exemption from the use of PPE will only be granted based on medical grounds, and after a risk assessment has been completed and approved by the Department Manager Health and Safety. In most circumstances, where PPE has been identified as a critical control for an activity, it is unlikely an exemption will be granted.
- If an employee has a medical condition which renders them unable to use PPE, they must provide a medical certificate to the Health & Wellbeing Team detailing the condition and the reasons the PPE cannot be used. TasWater may seek additional information from the employee’s medical practitioner, or independent medical advice to further understand the situation and find a safe solution.”⁶³

[46] This circumstance also does not weigh in favour of a conclusion that the direction at issue is not reasonable.

[47] *Fourth*, the CEPU says, based on Ms Taylor’s evidence,⁶⁴ TasWater indicated an intention to retain 15 PAPR and the cost of acquiring additional units in the same quantity is only \$33,300.28. The PAPR units to be retained are for limited use in respect of some activities. TasWater is entitled to opt for the less expensive but effective RPE, having regard to the limitations inherent in using PAPR – specifically, because of the “sequencing of tasks, unplanned activities, and challenges with decontamination and maintenance of units”.⁶⁵ Accordingly, this circumstance also does not weigh in favour of a conclusion that the direction at issue is not reasonable.

[48] *Fifth*, relying on Mr Burnaby’s evidence,⁶⁶ the CEPU says that PAPR has been used previously by operators in their day-to-day cutting and digging activities and are not inappropriate for such tasks. The evidence is not so broadbrush. Mr Burnaby spoke of the RPE he used from about 2015 to 2016 and why he stopped. He gave no evidence about what other employees did or used.⁶⁷ In any event, TasWater explained why it has chosen not to permit general use of PAPR. Its reasons are rational and sound. That PAPR might previously have been more widely used does not undermine those reasons nor does it suggest that the direction now given is not reasonable.

[49] As against all of this, there are several circumstances which squarely point to the direction being reasonable. *First*, the direction is aimed at ensuring that TasWater’s employees do not become ill or die from silicosis or asbestosis disease. *Second*, as earlier noted the WHS Act requires TasWater to ensure, so far as is reasonably practicable, the health and safety of its employees and the direction is directed to discharging that duty. *Third*, regulation 44 of the WHSR requires TasWater to provide its employees with appropriate PPE and for the RPE supplied to be effective, the evidence makes clear that employees must be clean shaven. *Fourth*,

both AS/NZS 16975.3:2023 and manufacturer instructions clearly specify that employees using the supplied RPE must be clean shaven.

[50] *Fifth*, the revised PPE procedure was implemented after extensive consultation earlier noted. In so doing I am satisfied, based on Ms Taylor’s evidence that TasWater has discharged its consultation obligations under s 47 of the WHS Act and the Agreements. *Sixth*, having regard to the potential harm of inhaling hazardous materials, which can be deadly, I do not consider the requirement to be clean shaven on the parts of the face which contact the seal of the RPE is onerous. Nor do I find the personal impacts set out in the statement of Mr Holz to be particularly persuasive.⁶⁸ *Seventh*, the direction in effect only applies to employees who will, or are likely to, perform work that would require the usage of RPE. *Eighth*, as earlier noted clause 5.7 of the revised PPE procedure allows for exemptions in limited and appropriate situations. *Ninth*, the direction being one based on health and safety considerations is in the best interests of TasWater’s employees, and it appears to me to be both rational and appropriate.

[51] For these reasons, I am comfortably satisfied that the direction that TasWater’s employees comply with the PPE Procedure is a reasonable direction. And as I earlier concluded, the direction is lawful. Consequently, the answer to the first question is “no”.

[52] TasWater has not enforced its direction pending the determination of this dispute. To that end, it has effectively maintained the status quo. Given the answer to the first question, it is strictly unnecessary in these circumstances to answer the second question, but since the parties have addressed the question, I will answer it.

[53] The answer to the second question is “no” as the first exception is engaged. My reasons may be shortly stated.

[54] Clause 63.1(b) of each Agreement provides that “[u]nless a reasonable concern related to the health and safety of any person exists, or the parties agree otherwise, that the position that existed prior to the dispute situation arising will prevail”. TasWater says that the first exception is engaged.

[55] There is no real dispute about the proper constructions of the provisions,⁶⁹ save that the CEPU says that there must also be a sufficient nexus between the departure from the status quo and the concern. To the extent that the CEPU contends that the departure from the status quo must be justified by an existing reasonable concern related to the health and safety of any person, I agree – that much is self-evident. But its contention has a broader import, with which I will shortly deal.

[56] The CEPU does not dispute that TasWater has a concern about health and safety relating to the efficacy of its RPE to provide protection to operators (presumably those who present for work unshaven) who use RPE, but says that because the departure must itself be in service of responding to the concern about health and safety, the requirement for employees to comply with the PPE procedure does not reasonably address the concern because:

- Operators are required to use exclusively disposable P2 respirators for multiple tasks with a risk of inhaling harmful particles, despite not having been successfully fit-tested on those respirators;

- the direction that Operators be clean shaven is in service only of wearing those P2 respirators as PPE, which is an ineffective protection for those who are not successfully fit-tested; and
- the direction that Operators be clean shaven at all times rather than when required to wear the relevant PPE goes beyond what is required to avert the risk of which TasWater claims a concern.⁷⁰

[57] The contentions in the first two dot points above are rejected for reasons earlier given. Ms Taylor's evidence was that fit testing is being undertaken and that all employees will be successfully fit-tested, which I accept. Moreover, the revised PPE procedure requires that "[m]anufacturer's instructions and regulatory guidelines must be followed in relation to facial hair and proper fit/seal" [emphasis added].⁷¹ Thus, no clean shaven Operator will be required to use RPE unless the Operator has been fit tested for the RPE to be used. As fit testing is a part of the revised PPE procedure, a direction to comply with that procedure does not require a clean shaven employee to use RPE for which the employee has not successfully been fit-tested. The third dot point simply cannot be accepted, considering the evidence that both AS/NZS 16975.3:2023 and manufacturer instructions clearly specify that employees using the supplied RPE must be clean shaven.

[58] But in any event, the CEPU's construction that the departure from the status quo must be in service of responding to the concern about health and safety is not correct. The concern about health and safety must arise from the maintenance of the status quo. That is, the health and safety concern about a person must arise from the fact that TasWater has not enforced its PPE procedure and that employees did not need to be clean shaven where the RPE mask seal touches the face. That is the status quo and, plainly, that raises a concern that employees are at risk of breathing in hazardous materials because they are not clean shaven where the RPE mask seal touches the face. On the evidence, that is a reasonable concern and one that engages with the first exception. Thus, departure from the status quo is justified by the reasonable concern and in the result employees will have to be clean shaven where the RPE mask seal touches the face. And so, even on the CEPU's construction, a departure from the status quo by requiring employees to be clean shaven will meet TasWater's reasonable concerns relating to the health and safety of those persons.

Conclusion

[59] For the reasons set out above, I answer the questions posed for arbitration as follows:

Q: Is the direction that TasWater's employees comply with the Applicant's PPE Procedure a lawful and reasonable direction?

A: Yes.

Q: Does the 'status quo' provision of the [Enterprise] Agreements apply?

A: No. The first exception in clause 63.1(b) of each Agreement is engaged.



DEPUTY PRESIDENT

Appearances:

P Noakes solicitor for the applicant

D Austin for the respondent

R Flanagan for The Australian Workers' Union

Hearing details:

Hearing via Microsoft Teams

8 February 2024

Written submissions:

Applicant, 11 January 2024 and 7 February 2024

Respondent, 2 February 2024

The Australian Workers' Union, no written submissions

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¹ See for example *One Key Workforce Pty Ltd v Construction, Forestry, Mining and Energy Union* [2018] FCAFC 77 at [187]

² *Construction, Forestry, Maritime, Mining and Energy Union, Mr Matthew Howard v Mt Arthur Coal Pty Ltd T/A Mt Arthur Coal* [2021] FWCFB 6059 at [95]-[96]

³ *Ibid* at [264]

⁴ Exhibit 1 at [11]-[12] and [17]

- ⁵ Ibid at [13]
- ⁶ Ibid at [25]
- ⁷ Ibid at [24]
- ⁸ Ibid at [29]
- ⁹ Ibid at [33]
- ¹⁰ Ibid at [39]
- ¹¹ Ibid at [17]
- ¹² Ibid at [32]
- ¹³ Ibid at [41]
- ¹⁴ Ibid [45]
- ¹⁵ Ibid at [46]
- ¹⁶ Ibid
- ¹⁷ Exhibit 7 at [7]-[8]
- ¹⁸ Ibid at [11]
- ¹⁹ Ibid at [14]
- ²⁰ Ibid at [15]
- ²¹ Exhibit 3 at [25]
- ²² Ibid at [26]
- ²³ Exhibit 3, Annexure KT-7 at p 9 of 10
- ²⁴ Exhibit 3 at [28]
- ²⁵ Ibid at [1]
- ²⁶ Ibid at [34]
- ²⁷ Ibid at [35]
- ²⁸ Ibid at [36]
- ²⁹ Ibid at [37]-[38]
- ³⁰ Ibid at [40]-[44]
- ³¹ Ibid at [45]-[46]
- ³² Ibid at [48]
- ³³ Ibid at [50]
- ³⁴ Ibid at [52]
- ³⁵ Ibid at [56], Annexures KT-12 to KT-19
- ³⁶ Ibid at [57]-[58]
- ³⁷ Exhibit 3, Annexure KT-20 at pp 8 and 9 of 11
- ³⁸ Exhibit 3 at [60]-[72], Annexures KT-22 to KT-31
- ³⁹ Exhibit 1 at [65]
- ⁴⁰ Exhibit 6
- ⁴¹ Ibid at [1] and [3]
- ⁴² Exhibit 7
- ⁴³ Ibid at [1], [39]-[47]
- ⁴⁴ Ibid at [4]-[5]
- ⁴⁵ Transcript PN656-PN668
- ⁴⁶ Transcript PN661
- ⁴⁷ Exhibit 3 at [55] – [56(a)-(jj)]
- ⁴⁸ Exhibit 3 at [56(l)] and Annexure KT-15

⁴⁹ Exhibit 3 at [56], Exhibit 4 at [5]-[12]

⁵⁰ Exhibit 3, Annexures KT-8 and KT-9

⁵¹ Exhibit 6 at [32]

⁵² Exhibit 3, Annexure KT-1

⁵³ Exhibit 4 at [15]

⁵⁴ Ibid at [16]

⁵⁵ Ibid at [18]-[19]

⁵⁶ Ibid at [22]

⁵⁷ Transcript PN182-PN192; Exhibit 5

⁵⁸ Exhibit 3, KT-10

⁵⁹ Ibid at p 18 of 22

⁶⁰ Exhibit 3 at [51]-[52]

⁶¹ Exhibit 1 at [65]

⁶² Exhibit 2 at [6(c)]

⁶³ Exhibit 3, Annexure KT-20 at p 5 of 11

⁶⁴ Exhibit 3, Annexure KT-24, KT-29

⁶⁵ Exhibit 3 at [52(b)]

⁶⁶ Exhibit 6 at [19] where second appearing

⁶⁷ Ibid

⁶⁸ Exhibit 7 at [37]-[38]

⁶⁹ Applicant's Outline of Submissions at [38], Respondent's Outline of Submissions at [32]

⁷⁰ Respondent's Outline of Submissions at [33]-[34]

⁷¹ Exhibit 3, Annexure KT-20 at pp 8 and 9 of 11